91-871

No. _____

In The

Supreme Court of the United States

October Term, 1991

BATH IRON WORKS CORPORATION and COMMERCIAL UNION INSURANCE COMPANIES,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the First Circuit err in holding that benefits for loss of hearing claimed by retired workers under the Longshore and Harbor Workers' Compensation Act should be awarded under 33 U.S.C. § 908(c)(13), which governs claims for loss of hearing, rather than under 33 U.S.C. § 908(c)(23), which governs claims by retirees?

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APPENDIX

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[1] All parties to the proceeding below appear in the caption of the case with the exception of the Employee, Mr. Ernest C. Brown. Bath Iron Works is a Maine corporation whose common stock is owned by Fulcrum II, a New York partnership, and Prudential Insurance Company of America.

TABLE OF AUTHORITIES

OPINIONS BELOW

The appendix contains the decree of the First Circuit Court of Appeals which was reported at 942 F.2d 811 (1st Cir. 1991) (App-1). The Decision and Order *En Banc* of the Benefits Review Board dated November 26, 1990 is cited at 24 BRBS 89 (1991) and is reproduced at App. 21. The unreported Decision and Order of the Administrative Law Judge is dated October 3, 1988 and is reproduced at App. 31.

GROUNDS ON WHICH JURISDICTION INVOKED

The decree issued by the First Circuit was entered on August 27, 1991 (App. 1). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions of the Longshore and Harbor Workers' Compensation Act that are at issue in this case concern scheduled benefits for loss of hearing, benefits for retirees and time of injury. The provisions, which are reproduced at "Appendix D" (App. 48), include the following:

33 U.S.C. §902(10)
33 U.S.C. §908(c)(1-13, 21, 23)
33 U.S.C. §910(d)(2)
33 U.S.C. §910(i).

STATEMENT OF THE CASE

Mr. Ernest C. Brown worked as a riveter and chipper for Petitioner Bath Iron Works (hereinafter "BIW") in Bath, Maine until his retirement in 1972. In 1985, he filed a claim for permanent partial disability benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "the Act"). He alleged binaural loss of hearing caused by occupational noise through 1972.

The Office of Administrative Law Judges of the Department of Labor exercised jurisdiction of the claim under 33 U.S.C. §901 *et seq.* An Administrative Law Judge held on October 3, 1988 that Mr. Brown's time of injury was September 6, 1985 and that benefits were payable under 33 U.S.C. §908(c)(13) (App. 37, 40). BIW appealed to the Benefits Review Board of the Department of Labor (hereinafter "Board"). The Board affirmed on November 26, 1990, but two of its five members wrote separately to express the belief that benefits should instead be calculated under 33 U.S.C. §908(c)(23) (App. 27-30).

BIW filed a Petition for Review with the First Circuit under 33 U.S.C. §921(c). The Respondent, Director of the Office of Workers' Compensation Programs of the Department of Labor (hereinafter "Director"), also participated in the appeal. The First Circuit affirmed the Board, but disagreed with the Board's reasoning. The Court agreed with the Director that the time of injury occurred in 1972 when Mr. Brown was last exposed to loud noise (App. 19).

ARGUMENT

1. Introduction.

Mr. Brown is one of thousands of American shipyard workers to sustain a loss of hearing after years of exposure to loud noise. Claims for loss of hearing are routinely processed at BIW and every other large shipyard in this country.

Unfortunately, the Act is now subject to no fewer than three different interpretations when the worker is retired. The First Circuit, in this case, has instructed employers to process these claims one way, the Fifth and Eleventh Circuits have construed the Act a second way, while the Board applies yet a third construction of the Act to the remaining circuits.

2. Overview of Statutory Scheme.

The First Circuit "unscrambled" the statutory provisions at issue by first identifying three "systems" of compensation for permanent partial disability. Most body parts are "scheduled" under 33 U.S.C. §§908(c)(1-20). In particular, total loss of hearing is worth 200 weeks of benefits. 33 U.S.C. §908(c)(13). The total benefit equals two-thirds of the employee's average weekly wage times the percent of hearing loss times 200 weeks. 33 U.S.C. §908(c). For instance, two-thirds of a $300 average weekly wage ($200) times 50 percent loss of hearing times 200 weeks equals a single payment of $20,000.

The second "system" is not at issue in this case. It awards benefits as a function of lost earning capacity for

injuries *not* specifically scheduled. 33 U.S.C. §908(c)(21). Back injuries are a common example of this "system".

The third "system" was enacted by Congress in 1984. Prior to 1984, retirees could not collect compensation for loss of hearing or certain other diseases because they could not demonstrate a loss of earning capacity after retirement. As a result, Congress added four "retiree" provisions to the Act: 33 U.S.C §§910(d)(2), 910(i), 908(c)(23) and portions of §902(10). *Ingalls Shipbuilding v. Director, OWCP,* 898 F.2d 1088, 1090-91 (5th Cir. 1990).

The 1984 amendments allowed a limited benefit for diseases which do not become apparent until after retirement. 33 U.S.C. §908(c)(23) awards compensation based upon two-thirds of the retiree's average weekly wage times the percentage of whole body permanent impairment determined under American Medical Association guidelines. The benefits are payable weekly for the duration of the impairment, which is usually for life. The amendment applies "[n]otwithstanding paragraphs (1) through (22)". Consequently, on its face, the "system three" provision for a retiree applies "notwithstanding" the "system one" schedule for loss of hearing at 33 U.S.C. §908(c)(13).

For example, a 50 percent loss of hearing equals an 18 percent whole person impairment under tables supplied by the American Medical Association. Eighteen percent of two-thirds of a $300 average weekly wage equals $36 per week.

However, as noted by the First Circuit, 33 U.S.C. §908(c)(23) applies only where the average weekly wage is determined under 33 U.S.C. §910(d)(2). That provision

governs occupational disease claims where the time of injury as determined under 33 U.S.C. §910(i) occurs after retirement.[2] 33 U.S.C. §910(i), in turn, mandates that for disability "due to an occupational disease which does not immediately result in death or disability" the time of injury is the date on which the employee becomes or should become aware of the relationship between the employment and his disease.

These provisions raise two important questions. First, the time of injury is important because it determines the average weekly wage upon which benefits are calculated. In this case, Mr. Brown's time of injury could be 1972, when he was last exposed to noise, or 1985 when he became aware of his disease. If the time of injury is 1985 under 33 U.S.C. §910(i), then a second issue is whether Mr. Brown is entitled to a single lump sum based upon a percentage of hearing loss under 33 U.S.C. §908(c)(13), or weekly benefits based upon whole body impairment under 33 U.S.C. §908(c)(23).

3. Three Accepted Solutions to the Questions.

a. The Board's Solution.

The Board has held for years that the time of injury is the post-retirement date of awareness under 33 U.S.C. §910(i), but that a lump sum benefit must be paid under

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[2] The average weekly wage under 33 U.S.C. §910(d)(2) is the employee's own wage if the time of injury falls within one year of retirement. It is the national average weekly wage if the injury occurs more than one year after retirement.

33 U.S.C. §908(c)(13) rather than weekly payments under 33 U.S.C. §908(c)(23). The Board defends this result even though 33 U.S.C. §908(c)(23) applies "[n]otwithstanding paragraphs (1) through (22)".

b. The Fifth and Eleventh Circuits' Solution.

In *Ingalls Shipbuilding v. Director, OWCP,* 898 F.2d 1088 (5th Cir. 1990), the Fifth Circuit agreed with the Board that the time of injury for retired hearing loss claimants is the date of awareness under 33 U.S.C. §910(i). However, in reversing the Board, the Fifth Circuit held that weekly benefits must be paid under 33 U.S.C. §908(c)(23).

The Eleventh Circuit recently agreed that the time of injury for retired hearing loss claimants is the date of awareness under 33 U.S.C. §910(i), rather than the date of last exposure. *Alabama Dry Dock and Shipbuilding Corp. v. Sowell,* 933 F.2d 1561 (11th Cir. 1991)[3].

c. The First Circuit Solution.

The First Circuit has now turned confusion to chaos by adopting yet a third solution. The First Circuit agreed with the Director that the time of injury for *all* retired hearing loss claimants is the time of last exposure and that 33 U.S.C. §910(i) does not apply. Thus, the First Circuit agreed with the Board that benefits should be

[3] The Eleventh Circuit decision is dated June 24, 1991, after the June 5, 1991 date on which the First Circuit heard arguments in this case.

calculated under 33 U.S.C. §908(c)(13), but it disagreed as to the time of injury and average weekly wage.

Significantly, the First Circuit freely admitted that the Fifth Circuit case was "identical to this one" and that "[w]e * * * reach a conclusion different from that of the Fifth Circuit" (App. 11). To further confuse matters, the Board acknowledged in this case that it would follow the Fifth Circuit *only* in that Circuit (App. 27-28). It is nearly certain, therefore, that the Board will now follow this precedent in the First Circuit, the Fifth and Eleventh Circuit decisions in those Circuits, and its own "hybrid" solution in all other Circuits.

4. Reasoning of First Circuit is Flawed.

One reason that this conflict should be resolved by this Court is the inherent difficulty and unfairness of processing hearing loss claims three different ways depending upon geography. A second reason is that the fallacy of the First Circuit's decision is easily identified.

The Director led the Court down the garden path from 33 U.S.C. §908(c)(23) to §910(d)(2) and then to §910(i) before urging that these "retiree" amendments are all inapplicable because 33 U.S.C. §910(i) applies only to diseases which do *not* immediately result in disability. The Court accepted the Director's representation that occupational loss of hearing does not worsen after the last exposure and so disability *does* result by retirement. The Court cited no evidence to support this medical conclusion and, instead, relied upon a learned treatise referenced by the Director plus the fact that "no one in this case disputes its accuracy" (App. 12).

No one disputed representations concerning a learned treatise not in the record for the simple reason that the representations are irrelevant. This is because the Board has consistently held that a retiree may be compensated for the *entirety* of his hearing loss, including progressive losses caused after retirement by aging or presbycusis. See, e.g., *Labbe v. Bath Iron Works and Commercial Union Insurance Companies*, 24 BRBS 159 (1991). It *may* be that the noise-induced portion of a hearing loss does not worsen, but the same cannot be said of the entire compensable loss of hearing. Thus, an individual such as Mr. Brown may retire in 1972, but not notice a loss of hearing until years later when his presbycusis worsens and he undergoes testing and receives an audiogram.[4] Therefore, the time of injury for a retired hearing loss claimant can, and in this case did, occur well after retirement.

5. Reasoning of Fifth and Eleventh Circuits is Persuasive.

As noted, the Fifth Circuit disagreed with this approach in *Ingalls Shipbuilding v. Director, OWCP*, 898

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[4] Contrary to the First Circuit's assertion (App. 12), the Board did *not* concede that Mr. Brown's 84 [sic] percent deafness existed in 1972 at retirement. Instead, as noted by the ALJ, the 82.4 percent figure resulted from an audiogram performed on December 22, 1983 (App. 37). Too, the ALJ observed that this percentage resulted from loud noise as well as presbycusis. (App. 35).

F.2d 1088 (5th Cir. 1990). The Court specifically considered and *rejected* the Director's argument.

The Fifth Circuit observed that, prior to 1984, a retiree who sought compensation for an unscheduled ("system two") disease received nothing because he could not demonstrate a loss of wage earning capacity under 33 U.S.C. §908(c)(21). The Court viewed 33 U.S.C. §908(c)(23) as an *unambiguous* provision not subject to statutory construction. 898 F.2d at 1094. Further, it found no evidence that Congress did *not* intend to create a single scheme for all retirees rather than one scheme for retirees with hearing loss and one for retirees with other "long latency" diseases such as asbestosis. *Id.* On the contrary, the Fifth Circuit cited Senator Hatch's observation that, in two cases including one hearing loss case, the Board had denied compensation to workers whose diseases became manifest *after* retirement. 898 F.2d at 1093. Senator Hatch asserted that this "did not represent equitable policy" and that the Amendments made "express provision for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease". *Id.* The Court concluded that the Senator's reference to *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984), a hearing loss case, signalled Congress' intent to treat hearing loss like any other occupational disease. *Id.*[5]

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[5] The First Circuit chose to minimize the Senator's reference to *Redick* because (1) perhaps the Employee's symptoms became manifest *after* retirement contrary to the Court's newly formulated medical holding or (2) the holding in *Redick* was "simply wrong" (App. 15-16).

The Director's argument was also struck down by the Eleventh Circuit in *Alabama Dry Dock and Shipbuilding Corp. v. Sowell,* 933 F.2d 1561 (11th Cir. 1991). That Court held that, for purposes of fixing compensation in hearing loss cases, the time of injury occurs when the Employee becomes aware of the relationship between the employment and the disease. 933 F.2d at 1568. The Court concluded from the statute and its Legislative history that the reference to "occupational disease which does not immediately result in death or disability" in 33 U.S.C. §910(i) does *not* reflect a Congressional intent to treat hearing loss differently than other occupational diseases with respect to the time of injury. *Id.*

Thus, both the Fifth and Eleventh Circuits have specifically considered and *rejected* the very argument accepted by the First Circuit in this case. Those courts correctly relied upon the facts that the "retiree" amendments are unambiguous, that they apply "notwithstanding" 33 U.S.C. §908(c)(13), that Senator Hatch believed that a hearing loss case was one reason for the "retiree" amendments and that no legislative history suggests a different conclusion.

CONCLUSION

The First Circuit's holding is both flawed and in direct conflict with identical cases decided by the Fifth and Eleventh Circuits. BIW respectfully requests that a writ of certiorari issue to review the decision of the First Circuit and to resolve this conflict among the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A

Decree of the First Circuit entered August 27, 1991

United States Court of Appeals
For the First Circuit

No. 91-1079

BATH IRON WORKS CORPORATION
AND COMMERCIAL UNION
INSURANCE COMPANIES,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,
Respondent.

PETITION FOR REVIEW OF AN ORDER
OF THE BENEFITS REVIEW BOARD

Before

Breyer, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Caffrey,* *Senior District Judge*.
*Of the District of Massachusetts, sitting by designation.

BREYER, *Circuit Judge*. This appeal concerns the calculation of Longshore and Harbor Workers' Compensation Act disability benefits due a retired riveter partially disabled due to deafness. The Act provides three different systems for compensating partially disabled workers. The first applies to those suffering scheduled (*i.e.*, particular, specifically listed) injuries. The second applies to those

suffering other (unscheduled) injuries. The third applies to workers who retire before becoming disabled. The Labor Department's Benefits Review Board awarded benefits to Mr. Brown, the riveter, calculated through use of both first and third systems. The petitioner, Brown's employer, Bath Iron Works, argues that the Board should have used the third system alone (which would have produced a smaller award). The respondent, the Director of the Labor Department's Office of Workers' Compensation, defends the Board's result, while arguing that the Board should have used the first system alone. We agree with the Director.

I.

Background

A.

The Three Systems

To help the reader understand the three different compensation calculation systems, we shall first describe them in a simplified way without using statutory language.

System One: Scheduled Injuries. The Act's schedule (in §§ 8(c)(1)-(20), 33 U.S.C. §§ 908(c)(1)-(20)) lists a number of specific injuries, such as loss of an arm or a leg or total or partial deafness, followed by a specific number of weeks (for example, loss of an arm, 312 weeks). The Act entitles a worker suffering one of the listed injuries to two-thirds of his average weekly wages for the listed number of weeks. Thus, for example, a worker earning $600 per week (just over $30,000 per year), who loses an

arm, would receive about $400 per week (two-thirds of his average weekly wages) for 312 weeks, totalling about $125,000, spread out over six years. *See* 33 U.S.C. § 908(c)(1). If that worker had become completely deaf, he would receive the $400 per week (two-thirds of his average weekly wages) for 200 weeks, or about $80,000, spread over about four years. *See* 33 U.S.C. § 908(c)(13)(B). The schedule provides for proportionate modification of the award for partial losses.

System Two: "Unscheduled" Injuries. The Act sets forth a different method for compensating other injuries not specifically listed in section 8(c)'s schedule. In such cases, § 8(c) (21), 33 U.S.C. § 908(c)(21), says that a worker will receive two-thirds of the *difference* between his average weekly wages and his residual (post-injury) earning capacity (as determined by the Labor Department) for as long as the disability continues. Thus, the same $600 per week worker, who suffers, say, a slipped disk (not listed on the schedule) and who retains the capacity to earn only $150 per week, would receive benefits of $300 per week (two-thirds of the $450 *difference*) for as long as the disability continues.

System Three: Injuries Suffered by Retired Workers. In 1984, Congress amended the Act to provide a special system of compensation for workers whose job-related injuries (or diseases such as asbestosis) did not become apparent until after retirement. *See* 33 U.S.C. §§ 902(10), 908(c) (23), 910(d)(2), 910(i). In such cases the Act begins with the principle that a disabled worker should receive two-thirds of his average weekly wages for as long as he is disabled, but it then modifies that principle in two important ways.

First, it multiplies the average weekly wage by a percentage, namely the percentage of total disability that the worker has suffered. It takes this percentage from American Medical Association tables. *See* 33 U.S.C. § 908(c)(23). Those tables say, for example, that a totally deaf person is 35% totally disabled. *See American Medical Association Guides to the Evaluation of Permanent Impairment* 170 (3d ed. 1988). If the deaf worker's average weekly wage is $600, the worker would receive, not ⅔ of his weekly wage ($400), but $400 *multiplied* by the percentage of total disability (35%), or $140 per week for the duration of his disability. Because System Three multiplies the average weekly wage by this percentage-of-total-disability, it is often less generous than System One. Sometimes it could turn out to be more generous, however, for it makes its smaller payments, not just for a limited number of weeks, but indefinitely as long as the worker is disabled.

Second, System Three calculates "average weekly wages" in a special way. If the disability appears during the first year after retirement, that term simply means the wages the worker earned just before retirement. *See* 33 U.S.C. § 910(d) (2)(A). If the disability appears after the first year, however, that term means a national average weekly wages figure that the Department of Labor calculates. *See* 33 U.S.C. § 910(d)(2)(B). Depending upon what the worker actually made before retiring, this System Three definition results in awards that are sometimes less generous, but sometimes more generous, than awards under System One.

B.

The Statute's Structure

The key statutory language setting forth these three systems includes the following:

1. A *definitional* section defines " disability" (in relevant part) as

> incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . .

33 U.S.C. § 902(10). It adds a special definition of "disability" as

> permanent impairment, determined . . . under . . . American Medical Association [guidelines], in the case of an individual whose claim is described in section 910(d)(2) [i.e., System Three].

Id. The definitions also make clear that "injury" includes both job-related accidental injuries and occupational diseases. *See* 33 U.S.C. § 902(2).

2. *Key introductory, operative language, applicable to all three systems,* says

> In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages . . . and shall be paid to the employee, as follows:

33 U.S.C. 908(c).

3. Immediately after this introductory language, the statute contains *twenty-three numbered subparagraphs.*

a. Subparagraphs (1) - (20) and (22) contain the schedule, which we have called "System One." Subparagraph (13), for example, sets forth the number of weeks compensation for hearing loss. See 33 U.S.C. §§ 908(c)(1)-(20), (22).

b. Subparagraph (21) contains what we have called "System Two." It says

> Other cases: In all other cases in the class of disability, the compensation shall be $66^2/_3$ per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter . . . payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21).

c. Subparagraph (23) contains the basic instruction for System Three. It says,

> Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be $66^2/_3$ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the [AMA guidelines], payable during the continuance of such impairment.

33 U.S.C. § 908(c)(23).

4. As the last quoted sentence makes clear, *subparagraph (23)* (*i.e.*, System Three) applies only "to a claim . . . for which the average weekly wages are determined under section 910(d)(2)." That subsection, 33 U.S.C. § 910(d)(2), and the definitional section referred to in that

section, 33 U.S.C. § 910(i), set forth the System Three method for calculating "average weekly wages" that we have described above. See pp. 5 - 6, *supra*. More importantly for present purposes, that section says that its calculation method shall be used

> with respect to any claim based on a . . . disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs
>
> > (A) within the first year after the employee has retired, . . . or
> >
> > (B) more than one year after the employee has retired. . . .

33 U.S.C. § 910(d)(2). Subsection (i), which this subsection cross-references, defines "time of injury" for System Three purposes. It says,

> For purposes of this section with respect to a claim for compensation for . . . disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee . . . becomes aware [or should have become aware] . . . of the relationship between the employment, the disease, and the . . . disability.

33 U.S.C. § 910(i).

All this quoted language seems complex. But, as we read it, it basically says something that is fairly simple: When the "time of injury" occurs before retirement, the Labor Department should calculate compensation under either System One (if the injury is scheduled) or System Two (if the injury is not scheduled). When the "time of

injury" occurs after retirement, the Labor Department should calculate compensation under System Three.

C.

The Need for System Three

Congress enacted the 1984 amendments creating System Three in response to a Benefits Review Board decision called *Aduddell v. Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. 131 (1984). In *Aduddell*, the Board considered a worker with asbestosis, who retired "prior to the manifestation of [the] . . . occupational disease." *Id.* at 133. The Board, pointing out that the "disease became manifest" long "after the claimant had retired," reasoned that its occurrence did not bring about a "loss of wage-earning capacity." *Id.* Hence, the "injury" (*i.e.*, the disease) was not a "disability" as the Act defines that term. *Id.* Subsequently, the Board decided *Redick v. Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. 155 (1984), a case involving a worker's deafness that did not become "manifest" until after the worker had retired. It held, for similar reasons, that the Act did not authorize compensation. *See id.* at 157.

Congress enacted System Three in order to provide compensation that *Aduddell* denied. Congressional reports focused primarily upon "long-latency diseases" and Board cases that had considered asbestos-related diseases. *See* H.R. Conf. Rep. No. 1027, 98th Cong., 2nd Sess. 30 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 2771, 2780 (stating that the conferees specifically rejected the holdings of *Aduddell* and *Dunn v. Todd Shipyards*, 13 Ben. Rev. Bd. Serv. 647 (1981), both of which

involved asbestos-related diseases); H.R. Rep. No. 570, 98th Cong., 1st Sess. 10-12 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2743-45 (describing the amendments as concerning "long-latency occupational diseases," and specifically rejecting *Dunn*, which concerned an asbestos-related disease); *cf.* 130 Cong. Rec. H 9730 (daily ed. Sept. 18, 1984) (remarks of Rep. Miller) (stating that the amendments are intended to overrule *Dunn*, *Aduddell*, and *Worrell v. Newport News Shipbuilding and Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. 216 (1983), all of which involved asbestos-related diseases). Senator Hatch, a sponsor of the amendments, said that decisions such as *Aduddell* and *Redick* "did not represent equitable policy." 130 Cong. Rec. 26,300 (1984) (remarks of Sen. Hatch). He noted that the amendments made "express provisions for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease." *Id.* In essence, Congress seems to have read the Board's decisions as denying compensation to workers whose job-related injuries occurred after retirement, and it rewrote the statute to make certain those workers received compensation.

II.

The Legal Issue

The worker in this case, Ernest C. Brown, worked for Bath Iron Works almost continuously from 1939 until 1972, when he retired. In 1985 he received the results of a hearing test that showed he had lost 82.4% of his hearing while he was at work. He then asked for compensation (taking advantage of a special statutory provision that, in effect, tolls the time deadline for filing a claim based on

deafness until after the worker receives an audiogram). The Board, in awarding him compensation, said that, since he was a retired worker, he fell within the scope of System Three. But, it added that it would calculate compensation according to System One. The Board noted that, for a deaf person, System One's compensation (2/3 of average weekly wages for, say, 200 weeks) would likely prove far more generous than System Three compensation (2/3 average-weekly-wages times percent-of-total-disability (*e.g.*, 35%) as long as the disability persists). It pointed out that a deaf worker who filed before retirement would automatically receive the former compensation. And, it could find no reason why Congress would want a deaf worker who did not file until after retirement to receive so much less. It referred to a Supreme Court case, *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980), which it took as holding that System One's schedule provides the proper compensation for anyone suffering a scheduled injury.

Bath Iron Works, Brown's employer, appeals the Board's decision, arguing that it makes no sense. Look at the words of the statute creating System Three, says Bath. Those words do not create any kind of "hybrid" system. Rather, they say specifically that, where System Three applies, the Board should calculate benefits as System Three commands, *"notwithstanding paragraphs (1) through (22)," i.e. "notwithstanding"* the statute's instructions for calculating System One and System Two benefits. *See* 33 U.S.C. § 908(c) (23). The Supreme Court case, *Potomac Electric*, adds Bath, has nothing to do with the matter. Rather, that case concerned a worker with a scheduled System One injury (permanent partial loss of the use of

his leg) who wanted to obtain (in his case, larger) unscheduled System Two benefits. The Supreme Court held that he could not do so, primarily because the introductory language applicable to both systems (indeed, to all three systems) says that the compensation *"shall be"* what the subsequent paragraphs provide. See *Potomac Electric*, 449 U.S. at 274. In other words, where those subsequent paragraphs provide a schedule, *see* 33 U.S.C. §§ 908(c) (1)-(20) & (22), the compensation shall be the scheduled amount; where the injury is unscheduled, *see* 33 U.S.C. § 908(c)(21), it shall be the unscheduled (subparagraph 21) amount. Bath might have added that, in fact, *Potomac Electric* supports Bath, not the Board, for the language "shall be" also applies to System Three's subparagraph (23). Thus, where subparagraph (23) applies, compensation shall be in the amount that it provides *"notwithstanding paragraphs (1) through (22)."* 33 U.S.C. § 908(c)(23).

The Fifth Circuit has accepted the very argument that Bath makes here. And, in a case identical to this one, it has ordered the Board to recalculate benefits under System Three, not System One rules. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 1091 (5th Cir. 1990). The Director of the Labor Department's Office of Workers' Compensation Programs urges us, however, to reach a different result. The Director argues that the Board has reached the correct result, but used the wrong reasoning to get there. We find the Director's argument convincing. We therefore must reach a conclusion different from that of the Fifth Circuit.

The Director's argument is a simple one. He agrees that System Three would apply in its entirety to a worker

who suffers an injury after retirement. And, he agrees that asbestosis is normally that kind of injury. But, deafness, he says, is not. Rather, deafness is an injury that a worker typically suffers *before* retirement. After retirement a worker's workplace-noise-induced deafness will not ordinarily grow worse; if anything it will get better. *See* R.T. Sataloff & J. Sataloff, *Occupational Hearing Loss* 357 (1987). Moreover, unlike asbestosis, the symptoms of deafness occur simultaneously with the "disease." In other words, to say that a worker is "84% deaf" is to say that he has lost 84% of his hearing. If he does not notice his deafness, and does not file a claim until long after retirement, that fact does not mean he is not deaf; it does not mean he has no deafness symptom; rather, it means he may have grown accustomed to his deafness, which is quite a different matter.

We accept the Director's description of deafness as accurate for two reasons. First, the Director supports that description with citations to appropriate scientific treatises. Second, no one in this case disputes its accuracy. Indeed, the Board itself concedes that Brown became 84% deaf in 1972, at the workplace. It does not say that Brown had a disease that *only later*, after retirement, caused him to lose his hearing.

Once we accept the Director's (and the Board's) description of the characteristics of deafness, the law seems to us to mandate compensation according to System One. The language applicable to System Three makes clear that that System does not apply at all. As we have pointed out above, System Three's subparagraph (23) says that it applies only in cases where average weekly wages are compensated under "section 910(d)(2)." 33

U.S.C. § 908(c)(23). Similarly, the special part of the statute's "disability" definition that refers to the AMA guidelines applies only to "an individual whose claim is described in section 910(d)(2)." 33 U.S.C. § 902(10). Section 910(d)(2) says that it applies only where the "disability . . . occurs . . . within the first year *after the employee has retired* . . . or . . . more than one year *after the employee has retired*. . . . " 33 U.S.C § 910(d)(2). Using ordinary English, however, one would normally say that a worker who becomes deaf before retirement is a worker whose disability "occurs" *before* retirement, not after retirement. Hence, the language of section 910(d)(2) seems not to apply to a worker who becomes deaf at the workplace.

The same section, section 910(d)(2), reinforces the same point by making clear that it applies only where there is a *"time of injury (as determined under subsection (i))."* 33 U.S.C. § 910(d)(2). Subsection (i) calculates a special post-retirement time of injury "with respect to a claim for compensation for . . . disability due to an occupational disease which does not immediately result in . . . disability." 33 U.S.C. § 910(i). Again, using ordinary English, one would normally say that deafness is a disease that causes its symptoms, namely loss of hearing, simultaneously with its occurrence. One simply cannot say that a person suffering from deafness is not deaf – whether or not he notices how deaf he is.

Just as the statute's language suggests that the worker who becomes deaf just before retirement falls outside the scope of System Three, it suggests that he falls within the scope of System One. The statute says that if he suffers a "disability," 33 U.S.C. § 908(c), called "loss of hearing," 33 U.S.C. § 908(c)(13), he "shall be

paid," 33 U.S.C. § 908(c), System One's scheduled (§ 908(c)(13)) amount. He suffers a "disability" if he had an "incapacity because of injury to earn the wages" which he was "receiving at the *time of injury*." 33 U.S.C. § 902(10). Again, given the Director's undisputed account of how deafness occurs, one would ordinarily say that the "time of injury" in the case of a worker who goes deaf on the job is the time he loses his hearing, even if he did not notice that loss until later. Hence, such a worker would be entitled to System One compensation.

We recognize four arguments, however, that tend to support Bath, or the Board. First, in *Redick v. Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. 155 (1984), the Board came to a different conclusion. There it held that a deaf worker who voluntarily retires "prior to the manifestation of his disability" is *not* entitled to System One compensation. *See id.* at 157. It adopted the same reasoning it had used in *Aduddell* in respect to asbestosis, namely that the injury to such a worker does not create (in the words of the statute's "disability" definition) an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." *See id.* Since he was retired anyway, the Board said, the deafness did not cause a loss of wage-earning capacity. Extending this reasoning, a deaf worker such as Brown who did not become aware of his disability nor file his disability benefit claim until after he voluntarily retired, would not fall within Systems One or Two (for his injury would not satisfy the normal "disability" definition), and if he did not fall within System Three, he would not fall within any system at all.

We do not believe, however, that *Redick* leads to such a result. If we assume that the *Redick* Board used the word "manifest" to refer to the appearance of disabling symptoms, then the present case is distinguishable. If *Redick* used "manifestation" in such a way, then it must either have (1) made what it would now apparently concede were incorrect assumptions about the nature of normal hearing loss (namely, it must have assumed that workplace incidents often cause no immediate hearing loss, but lead to delayed hearing loss), or (2) believed that it was dealing with a special case in which a pre-retirement disease did not cause hearing loss prior to retirement, but caused such loss after retirement. Under either of these factual assumptions, the claim in *Redick* would now (after the 1984 amendments) be treated under System Three, because the disability in question would fall within the scope of § 910(i)'s category of a "disability due to an occupational disease which does not immediately result in . . . disability," and therefore the "time of injury" (under § 910(i), the time of awareness "of the relationship between the employment, the disease, and the death or disability") would be after the employee had retired. By contrast, in this case, we assume that Brown's disabling symptoms appeared simultaneously with his disease – deafness – over the course of his employment. Thus, Brown's injury "manifested" itself prior to retirement; and therefore the *Redick* holding does not fit this case, nor does this case fall within System Three.

If we assume that *Redick* used "manifest" to refer, not to the appearance of disabling symptoms, but to the point at which the claimant notices those symptoms – in other words, if the *Redick* Board believed that the hearing loss

occurred before retirement, but the claimant did not notice the hearing loss until after retirement – then we believe that the holding in *Redick* was simply wrong. A person who loses his ability to hear even just before he retires, like a person who loses an arm just before he retires, is a person about whom one often can reasonably say, "he has an 'incapacity because of injury to earn the wages' that he was 'receiving at the time of injury.' " 33 U.S.C. § 902(10). For one thing, the word "incapacity" does not mean a failure, in fact, to earn prior wages; it means an *inability* to earn prior wages. A physically fit retired worker is likely to be *able* to earn prior wages (though he likely chooses not to do so); a retired worker without an arm or without hearing is, comparatively speaking, often less likely to be *able* to earn prior wages even should he choose to try to do so. For another thing, and more importantly, the statute *presumes* that a worker who suffers a scheduled injury suffers an "incapacity because of injury to earn" prior wages. Such has long been the law. The Second Circuit, more than thirty-five years ago, wrote that

> in the case of schedule losses, the Congress has determined that a loss of wage-earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment.

Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 144 (2d Cir. 1955). And, the Supreme Court, more recently describing System One, said,

> the injured employee is entitled to receive two-thirds of his average weekly wages for a specific

> number of weeks, regardless of whether his earning capacity has actually been impaired.

Potomac Electric, 449 U.S. at 269. This law is understandable, for without it (and under the Board's *Redick* reasoning), a worker, who, say, suffered a bad accident the day before his retirement, and who awoke from a coma a week later (after retirement) to find he had lost an arm, would receive no scheduled compensation.

Second, the Board points out that Senator Hatch, a sponsor of the 1984 "System Three" amendments, listed *Redick* as one of several cases that he believed "did not represent equitable policy." 130 Cong. Rec. 26,300 (1984) (remarks of Sen. Hatch). It concludes from this that the System Three amendments, designed to overcome the inequitable results, must have included hearing loss cases. This argument, however, seeks to prove far too much on the basis of far too little. For one thing, the Senator may well have read *Redick* as involving hearing loss that did not *occur* until after retirement, in which event, it would resemble asbestosis and fall within System Three. For another thing, the Senator need not have cared about the precise rationale of *Redick*, for, insofar as it dealt with typical hearing loss occurring prior to retirement, it could be corrected judicially and did not necessarily require special legislation. Finally, the legislative debates primarily concerned "long-latency diseases," such as asbestosis, not hearing loss, and there is no good reason for thinking that Senator Hatch, in his effort to correct unfairness, did want, or would have wanted, the law to treat "hearing loss" cases less generously than it would have done without the amendments.

Third, the Fifth Circuit, in *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 898 F.2d 1088 (5th Cir. 1990), has held that the Board correctly placed hearing loss cases within System Three (though it then incorrectly hybridized System Three by bringing in System One's schedule to calculate the payment). In particular, the Fifth Circuit so held while agreeing that "differences may exist between the progression of asbestosis versus hearing loss." *Id.* at 1093. It agreed that asbestosis (as described in *Aduddell*) is a disease with symptoms that often do not appear until after retirement, while in hearing loss cases "the full extent of the . . . injur[y] is set on the day" the worker "leaves the workplace." *Id.* But, it added that the "fact that hearing loss does not progress after retirement does not compel a different compensation scheme absent a showing that Congress intended one." *Id.* at 1093-94. And, it could find no reason for thinking that Congress did intend a different scheme.

We have found such a reason, however, for thinking that Congress did intend a different scheme, in the plain language of the statute. The statute, while complex with operative language placed in different sections, is not ambiguous or unclear once its different parts are unscrambled. For the reasons we have already stated, we conclude that its language treats a hearing loss case differently than an asbestosis case for the very reason that the Fifth Circuit found irrelevant. Because the hearing loss symptoms are irrevocably fixed before retirement, while the asbestosis symptoms may not appear until after retirement, the "time of injury" in the first case, but not the second case, is prior to retirement. Therefore, System Three's operative language (in 33 U.S.C. §§ 910(d)(2) &

910(i)) does not apply, while the ordinary System One and System Two definitions and operative language do apply.

Fourth, the Board, and the Fifth Circuit, refer to cases that define "time of injury" as the time when a disease "manifests" itself rather than the time when the worker suffers his last, disease-causing, exposure. *See Castorina v. Lykes Brothers Steamship Co., Inc.*, 758 F.2d 1025, 1031 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985); *Todd Shipbuilding Corp. v. Black*, 717 F.2d 1280, 1289-91 (1983), *cert. denied*, 466 U.S. 937 (1984). These cases, however, are beside the point here, for they concern asbestosis, a disease in which the disabling *symptoms* occurred after retirement. In so far as the courts and Board used the word "manifest" to refer to the appearance of disabling symptoms, these decisions make sense, but they seem inapplicable here, where hearing loss is fixed forever before retirement.

In sum, the Director's interpretation is consistent with the ordinary meaning of the statute's language and with its structure; and, it permits the System One compensation calculations that the Board believed necessary to avoid unfairness. The arguments for a different reading are not very convincing. We therefore accept the interpretation of the statute for which the Director argues.

We must mention one final point. The Director points out that, although the Board said it was awarding System One compensation in this case, in fact it did not properly perform the System One calculation. System One requires the calculator to use the "average weekly wages" as of the time of disablement (in this case, 1972). *See* 33 U.S.C.

§ 910. Instead, the Board used a System Three figure, namely the national average weekly wages as of the time of filing the claim (a 1985 figure). The Director, however, has not asked the Board, nor this Court, to recalculate the award, but, rather, has asked us to affirm it. Bath, while disagreeing with the Board's use of System One's calculation method, nowhere complains of the calculation having been made improperly. The claimant obviously does not want a recalculation (which would produce a lower award). And, the matter has no significance beyond this case. We therefore consider the issue waived.

The Board's award is

Affirmed.

APPENDIX B

Decision and Order *En Banc* of the Benefits Review Board
Filed November 26, 1990

BRB No. 88-3873

ERNEST C. BROWN Claimant-Respondent v. BATH IRON WORKS CORPORATION and COMMERCIAL UNION INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	(Filed Nov. 26, 1990) DECISION and ORDER *EN BANC*

Appeal of the Decision and Order of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, and SMITH, BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order (88-LHC-145) of Administrative Law Judge Martin J. Dolan Jr. awarding benefits on a claim filed pursuant to the

provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings and conclusions of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was exposed to loud noise while working for employer as a riveter passer, a riveter, and a chipper from 1939 to 1947 and from 1950 until he retired in 1972. On December 29, 1954, claimant underwent an audiogram which revealed a 40.6 percent binaural hearing loss, but claimant never received the results of this audiogram. On March 15, 1977, an audiogram revealed that claimant had a moderate to severe sensorineural hearing loss in the left ear and a severe to profound sensorineural hearing loss in the right ear. Although claimant underwent several audiograms in the next several years, he did not receive copies of the results of these audiograms until he requested them on September 6, 1985. Claimant filed this claim on September 20, 1985, requesting permanent disability benefits for his hearing loss.

The administrative law judge determined that claimant's notice and claim were timely filed, that his hearing loss constitutes an occupational disease, and that claimant suffered a permanent 82.4 percent binaural hearing loss caused by his employment. The administrative law judge further determined that the voluntary retiree provisions, 33 U.S.C. §§902(10), 910(d)(2) (Supp. V 1987), are applicable and that because the time of injury, *see* 33 U.S.C. §910(i) (Supp. V I987), September 6, 1985, occurred more than one year subsequent to claimant's retirement,

the applicable average weekly wage under Section 10(d)(2)(B) is $289.83. Notwithstanding claimant's voluntary retiree status, the administrative law judge, relying on *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988), concluded that claimant's hearing loss benefits must be calculated pursuant to 33 U.S.C. §908(c)(13) (Supp. V 1987), rather than 33 U.S.C. §908(c)(23), and awarded claimant compensation for a 82.4 percent binaural hearing loss under Section 8(c)(13). The administrative law judge also awarded employer relief pursuant to 33 U.S.C. §908(f) (Supp. V 1987).

On appeal, employer argues that the administrative law judge erred in failing to calculate claimant's hearing loss benefits pursuant to Section 8(c)(23). Employer avers that the retiree provisions were enacted to provide a limited benefit based on impairment of the whole person and that if Congress had intended retirees to obtain scheduled awards on the same basis as non-retirees, Congress would not have provided that Section 8(c)(23) was applicable notwithstanding Section 8(c)(1)-(22).[1] Claimant responds urging affirmance of the administrative law judge's Decision. Director responds that the administrative law judge erred in determining claimant's time of injury pursuant to Section 10(i) because although hearing loss is an occupational disease, it is one which immediately results in disability.

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[1] Employer avers that claimant's 82.4 percent binaural hearing loss translates into a 29 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (2d ed. 1984).

The contentions of the employer and the Director have previously been considered and rejected in *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) (*en banc*), in which the Board held that benefits for a claimant who retires for reasons unrelated to his hearing loss are to be calculated pursuant to Section 8(c)(13) and that the time of injury for purposes of calculating claimant's average weekly wage in a hearing loss claim is determined pursuant to Section 10(i) as amended in 1984. We note that the United States Court of Appeals for the Fifth Circuit held in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in pert. part & aff'g in part sub nom. Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), & *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989), that because on its face, Section 8(c)(23) states that it is to be applied notwithstanding Section 8(c)(1)-(22), the Board erred in *Machado* in holding that hearing loss benefits for a voluntary retiree should be calculated pursuant to Section 8(c)(13). The Fifth Circuit, however, affirmed the Board's determination that amended Section 10(i) applies to hearing loss claims.

Initially, we reject the Director's Section 10(i) argument for the reasons expressed by the Board in *Machado, supra*, and by the Fifth Circuit in rejecting the Director's assertion that amended Section 10(i) is inapplicable in hearing loss cases in *Ingalls Shipbuilding*, 898 F.2d at 1092-94, 23 BRBS at 65-66 (CRT).[2]

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[2] The court also rejected claimants' assertions that even if Section 8(c)(23) is applicable, the relevant percentage used to calculate benefits should be the loss to hearing rather than the

(Continued on following page)

Regarding the issue of application of Section 8(c)(23), we continue to believe that a result different from that in *Ingalls Shipbuilding* may be reached in hearing loss cases based on our construction of Section 8 of the Act.[3] In *Machado*, the Board concluded that Congress did not intend to apply this provision in hearing loss cases. The Board relied on the decision of the United States Supreme Court in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980), that the schedule is the exclusive remedy for permanent partial disability of the parts of the body listed therein, noting that, unlike other occupational diseases, a scheduled remedy is provided for loss of hearing

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(Continued from previous page)

loss to the whole person, noting that 33 U.S.C. §902(10) (Supp. V 1987) states that when a claim comes under Section 10(d)(2), disability means permanent impairment determined under the American Medical Association *Guides to the Evaluation of Permanent Impairment* which espouse the philosophy that an impairment affects the whole person and thus disability must be expressed as a percentage of the whole person.

[3] Section 8(c)(23) was enacted in 1984 as part of a group of amendments intended to overturn the Board's decisions in *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 347 (1984), and *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984). In *Aduddell*, the Board held that a claimant who was a voluntary retiree at the time his occupational disease became manifest could not be compensated under the Act because he had no loss in wage-earning capacity. In *Redick*, this holding was extended to a hearing loss case, even though an actual loss in wage earning capacity need not be shown in order for claimant to recover under the schedule. The 1984 Amendments altered the definition of disability under the Act, extending it to include permanent impairment as defined by guidelines published by the American Medical Association for a specific class of claimants, voluntary retirees.

based on permanent impairment. Moreover, while all other occupational diseases could be compensated prior to the 1984 Amendments only if a loss in wage-earning capacity were shown under Section 8(c)(21), *see Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 347 (1984), hearing loss was compensated based on permanent impairment ratings prior to enactment of the amendments. In *Machado*, the Board noted that if Section 8(c)(23) were applied, it would effectively reduce the benefits paid to retirees for hearing loss since under that section, a measured hearing impairment must be converted to an impairment of the whole person. Under Section 8(c)(13), an employee's rated hearing loss is compensated based on the percentage of the loss for a limited period of weeks. The Board stated that compensating hearing loss under Section 8(c)(23) would result in disparate treatment between retired employees and others filing claims for hearing loss and that converting a scheduled payment to continuing weekly payments would not foster administrative efficiency. Although the Board recognized that Section 8(c)(23) sets forth a means of calculating benefits "notwithstanding paragraphs (1) through (22)" of Section 8(c), the Board held in *Machado* that given the above considerations, Congress could not have intended that it apply in hearing loss cases.

In *Machado*, the Board construed Section 8 in a manner consistent with the intent of Congress, the principle that the Act should be construed in a manner avoiding harsh and incongruous results and the beneficent purposes of the Act. We believe that the construction of the statute adopted in *Machado* best accomplishes these goals. Because this case arises in the First Circuit, which has not

addressed these issues, the arguments of employer are rejected for the reasons set forth in *Machado*. We therefore affirm the administrative law judge's award of permanent partial disability benefits for claimant's hearing loss pursuant to Section 8(c)(13).

Accordingly, the administrative law judge's Decision and Order awarding hearing loss benefits is affirmed.

SO ORDERED.

/s/ R P Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S. Dolder
I concur: NANCY S. DOLDER
Administrative Appeals Judge

Dated this 26th day of
November 1990

STAGE, Chief Administrative Appeals Judge, concurring in result only:

I concur in the majority's determination that employer is entitled to Section 8(f) relief. I disagree, however, with *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) (*en banc*), upon which the majority bases its opinion and instead agree with the conclusion of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in pert. part & aff'g in part sub nom. Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), & *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS

262 (1989), that *Machado* fails to provide a reasoned basis for not applying the plain language of Section 8(c)(23) to hearing loss claims by voluntary retirees. Nonetheless, I concur in the majority's affirmance of the administrative law judge's award of benefits for claimant's hearing loss pursuant to Section 8(c)(13) because this case arises in the First Circuit, which has yet to address whether 33 U.S.C. §908(c)(23) (Supp. V 1987) is applicable to a hearing loss claim by a voluntary retiree. I believe that the Board should continue to apply its own precedent until another United States circuit court of appeals speaks on this issue.

/s/ Betty J. Stage
BETTY J. STAGE, Chief
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues that hearing loss benefits for voluntary retirees are to be calculated pursuant to Section 8(c)(13), I disagree with the administrative law judge's determination that employer is entitled to Section 8(f) relief for the reasons espoused in my dissenting opinions in *Fucci v. General Dynamics Corp.*, 23 BRBS 161, 166-69 (1990), and *Balzer v. General Dynamics Corp.*, 23 BRBS 241, 244-46 (1990) (*en banc*), *aff'g on recon.* 22 BRBS 447 (1989). In my opinion, full liability for claimant's entire 82.4 percent binaural hearing loss rests with

employer under *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955).

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

McGRANERY, J., Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision that employer is entitled to Section 8(f) relief. I dissent, however, in their determination that Section 8(c)(13) rather than Section 8(c)(23) governs awards of hearing loss for voluntary retirees. Essentially, the majority determined that congress could not have intended for voluntary retirees to receive awards pursuant to Section 8(c)(23) for hearing loss due to occupational disease, because the small weekly payment, compared with a lump sum award pursuant to Section 8(c)(13), is both insignificant to claimants and administratively inefficient for employers. The United States Court of Appeals for the Fifth Circuit rejected this argument in *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). The court held that the Board was not free to ignore the language of Section 8(c)(23) which "[o]n its face . . . applies to retirees 'notwithstanding [§908(c)] paragraphs (1) through 22.' " *Id.* at 1090, 23 BRBS at 63 (CRT). Moreover, the court reviewed the legislative history of the 1984 Amendments and concluded that the "excerpts of the congressional Record indicate that retirees with hearing losses should be treated the same as all other retirees." *Id.* at 1092, 23 BRBS at 65 (CRT). In view of the lack of

substantial legal authority for the Board's decision and the clear holding of the Fifth Circuit in *Ingalls*, resting on the words of the statute and the legislative history, I think that the time has come for the Board to reverse its position taken in *Machado* and to hold that Section 8(c)(23) governs the awards to voluntary retirees who suffer hearing loss due to occupational disease.

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX C

Decision and Order of the Administrative Law Judge dated October 3, 1988

U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts
02109

In the matter of:	*	
Ernest C. Brown	*	Case No.
Claimant	*	88-LHC-145
against	*	OWCP No.
Bath Iron Works	*	1-85467
Employer	*	
and	*	
Commercial Union Insurance Co.	*	
Carrier	*	

Appearances:

Ronald W. Lupton, Esq.
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280 Front Street
Bath, Maine 04530
For the Claimant

Kevin Gillis, Esq.
Richardson & Troubh
P.O. Box 15340
Portland, Maine 04101
For Commercial Union Insurance Co.

Before: MARTIN J. DOLAN, JR.
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.*, herein referred to as the Act, filed by Ernest C. Brown, (hereinafter referred to as the Claimant), against Bath Iron Works Corporation (hereinafter referred to as Respondent) and Commercial Union Insurance Company. A hearing was held on February 10, 1988 in Portland, Maine at which time all parties were given the opportunity to present evidence and oral arguments.

Documentary evidence was submitted by the Claimant on a post-hearing basis in the form of a deposition of Dr. Peter Haughwout dated March 31, 1988; this document is admitted into evidence as Claimant's exhibit 20. The Employer and Carrier submitted on a post-hearing basis documentation in the form of a deposition of Dr. Robert Dixon dated March 18, 1988 and a deposition of Dr. David Hill dated March 28, 1988; these documents are admitted into evidence as Employer's exhibits 7 and 8 respectively. This Decision and Order is rendered based upon an evaluation of the entire record.

At the hearing, the parties agreed on the following material facts: that an employee/employer relationship

existed at all relevant times and that there is jurisdiction under the Act.

The case involves a claim for a binaural hearing loss and the issues are: 1) whether notice and claim were timely filed; 2) the nature and extent of the Claimant's hearing loss; 3) the causal relationship between employment and the hearing loss; 4) the average weekly wage and amount of compensation due to the Claimant; 5) whether the Claimant is entitled to medical benefits under Section 7; and 6) whether Section 8(f) is applicable.

Findings of Fact and Conclusions of Law

Claimant, age 68, began working for Bath Iron Works Corporation in 1939. Prior to that time, he had worked in a filling station and had no exposure to loud noise. Claimant had worked at Bath Iron Works from 1939 to 1947, first as a rivet passer on a riveting gang and then as a riveter. In 1947 he was laid off, returning to work for Employer in 1950 as a riveter and chipper continuing in this capacity until his retirement in 1972. Claimant testified that during the course of his work at Employer's shipyard he was exposed to loud noise not only from his activities, but also from noise generated from his co-workers. When questioned about the wearing of hearing protection, Claimant testified that he did not utilize any hearing protection during his employment at Bath Iron Works.

Claimant was administered an audiogram at the Bath Iron Works shipyard on December 29, 1954. The audiogram reflecting the results of that test has been submitted into evidence as Employer's exhibit 4; according to this

audiogram, the Claimant had experienced a permanent hearing loss at that time.

Subsequent to his retirement, Claimant saw his family physician, Dr. David Hill, in March 1976, who then referred him to Dr. Robert Dixon for a problem with nasal polyps. Dr. Dixon, an ear, nose, and throat specialist, removed the polyps from Claimant's nose and referred Claimant to the Pine Tree Society for audiological testing. Dr. Dixon testified that he concluded, on the basis of Claimant's work history, that Claimant had a noise induced hearing loss, but Dr. Dixon did not recall nor did his records indicate that he discussed this with the Claimant. The Claimant was tested on March 15, 1977 by Deborah Berman, a certified audiologist. Ms. Berman opined that the pure tone test results indicated "a moderate to severe sensorineural hearing loss in the left ear and a severe to profound sensorineural hearing loss in the right ear." (CX 13). She also opined that a hearing loss of this degree would interfere with normal conversation and indicated that the Claimant would be an excellent hearing aid candidate. The Claimant testified that the audiologist showed him the test results, but he did not recall discussing with her the cause of his hearing loss. Deborah Berman forwarded a copy of the March 15, 1977 report to Dr. Dixon; however, there is no evidence that Claimant was provided with a copy of the audiogram until September 6, 1985.

Claimant underwent further examination at Pine Tree Society's facility on April 17, 1978, December 22, 1983, and August 11, 1986. The December 22, 1983 audiogram in evidence satisfies the criteria of Section 8(c)(13)(C) and was the last audiogram performed prior to Claimant's

filing of his claim on September 20, 1985. It was administered by Deborah Berman and was forwarded to the Claimant on September 6, 1985. This audiogram revealed a binaural hearing loss of 82.4% pursuant to the AMA formula. Deborah Berman administered another audiogram on August 11, 1986 and opined that the pure tone thresholds had not changed significantly since Claimant's previous evaluation of December 22, 1983.

Dr. Peter Haughwout, a specialist in otolaryngology, examined the Claimant on September 24, 1985 and April 17, 1987. Based upon his review of audiograms dating back to 1954 and his examination of the Claimant, Dr. Haughwout commented in his report that Claimant had a sensorineural hearing loss in both ears consistent with job-related noise exposure at Bath Iron Works. Dr. Haughwout re-examined Claimant on April 17, 1987 to determine the cause of his hearing loss. He stated in his report that it would be appropriate to obtain further studies, however, he still agreed with his previous finding that Claimant's hearing loss was caused, in part, by noise exposure in his work place. Dr. Haughwout further testified by deposition on March 31, 1988 and attributed the principal cause of Claimant's hearing loss to exposure to loud noise at Bath Iron Works as well as to such secondary causes as presbycusis and possibly some other factor.

Dr. Joseph Sataloff, a specialist in otology, reviewed the Claimant's medical records and issued a report dated October 22, 1986. Dr. Sataloff opined that none of Claimant's hearing loss was caused by noise exposure in hi [sic] job. He further opined that Claimant's hearing loss is too

severe to have been caused by occupational noise exposure and that his hearing loss is inconsistent with occupationally induced hearing loss.

Section 13(b), as amended in 1984, requires that a claim for death or disability due to an occupational disease which does not immediately result in disability or death must be filed within two years after the employee or Claimant becomes aware, or in the exercise of reasonable diligence, or by reason of medical advice should have been aware of the relationship between the employment, the disease, and the death or disability, or within one year from the date of the last payment of compensation, whichever is later. In the case of a claim for hearing loss, the Benefits Review Board has held that the Section 13 statute of limitations does not begin to run until the employee has received an audiogram, with the accompanying report thereon, indicating a hearing loss and is aware of the relationship between such hearing loss and his employment. *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986).

It is clear from the facts of record that the time limitation provisions of Sections 12 and 13 of the Act, as amended in 1984 with the inclusion of Section 8(c)(13)(D), have been met, and that this claim is not time barred by either. While the record evidence does show audiograms conducted by Bath Iron Works and Pine Tree Society as early as 1954, there is no evidence indicating that Claimant received copies of any of these audiograms. Claimant filed a claim for benefits under the Act on September 20, 1985. The record evidence indicates that Claimant was not furnished a copy of any of the audiograms administered by Pine Tree Society until September 6, 1985 when

he requested said copies. Although Claimant may have suspected a causal relationship between his hearing loss and his employment, the time for notice and filing did not occur until he received a copy of an audiogram. This element was not satisfied until September 6, 1985 when the Claimant obtained copies of all of the audiograms previously performed at the Pine Tree Society. Thus, the notice and filing periods began to run on September 6, 1985 and Claimant having filed his claim subsequent thereto on September 20, 1985, clearly the requirements of Sections 12 and 13 have been timely fulfilled.

As to the degree of Claimant's hearing loss, the 1984 Amendments to the Act require that such determination be made under the AMA guides for the evaluation of permanent hearing impairments. As noted hereinbefore, Claimant was examined at Pine Tree Society on December 22, 1983 at which time the audiogram performed by a certified audiologist reflected an 82.4% binaural hearing loss according to the AMA guidelines. There is no evidence of a contrary audiogram made at that time, and furthermore the August 11, 1986 audiogram, according to Deborah Berman who administered the test, showed no significant change since Claimant's previous evaluation on December 22, 1983. I therefore find that Claimant has a permanent partial 82.4% binaural hearing loss. Notwithstanding the fact that the Claimant is a retiree within meaning of Section 8(c)(23) and Section 10(d)(2) of the Act as amended in 1984, I determine that the calculation of Claimant's compensation must be made pursuant to a scheduled award under Section 8(c)(13) of the Act rather than pursuant to Section 8(c)(23) of the amended Act, this by virtue of the dictate of the recent decision of the

Benefits Review Board in *MacLeod v. Bethlehem Steel Corporation*, 20 BRBS 234 (1988). In *MacLeod*, the Board concluded that while hearing loss resulting from prolonged on-the-job exposure to noise constitutes an occupational disease within the meaning of the Act, the amount of compensation for hearing loss, a permanent partial disability is specified as a scheduled injury in Section 8(c)(13), which should and does control the nature of the award.

Once an injury has been shown, there is a presumption that the injury arose out of and in the course of Claimant's employment. *See* Section 20(a) of the Act and *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir.) *cert. denied*, 429 U.S. 820 (1976). Aside from the presumption, the evidence supports the assertion that the Claimant has been exposed to injurious noise stimuli while employed at Bath Iron Works from 1939 through 1972 in the form of noise produced by himself and coworkers. Specifically, I credit the testimony of the Claimant, along with the deposition testimony of Dr. Haughwout and Dr. Dixon, as to the nature and severity of the noise exposure the Claimant had experienced at Bath Iron Works. Both Dr. Haughwout and Dr. Dixon opined that the Claimant's long history of noise exposure at Bath Iron Works had contributed, in part, to the Claimant's hearing loss. It is specifically noted that the fact that only a proportion of the Claimant's hearing loss is attributable to his noise exposure while working for the Employer does not affect the liability of the Employer in this occupational disease case involving a hearing loss inasmuch as the Benefits Review Board has held that an employee must be compensated for the full extent of his binaural

hearing loss even though a proportion of the hearing loss was not employment related. *Worthington v. Newport News*, 18 BRBS 200 (1986). While I am impressed with Dr. Sataloff's professional qualifications, I am persuaded to give special deference to the opinions of Dr. Haughwout and Dr. Dixon insofar as they both personally examined Claimant as well as reviewing his medical records and audiograms. Additionally, it is noted that Dr. Haughwout and Dr. Dixon both testified via deposition that Claimant had a work-related binaural hearing loss, thus allowing all adverse parties the opportunity to examine both of these witnesses. Accordingly, based on the Section 20(a) presumption and a preponderance of the record evidence, I find that Claimant was exposed to deleterious noise levels while employed by Bath Iron Works and that his hearing loss resulted, in part, from such acoustic trauma experienced while so employed at the Bath Iron Works shipyard and thus his hearing loss arose out of and in the course of his employment in Bath Iron Works.

It is noted that the Claimant is a retired employee and was such at the time that his claim for benefits was filed on September 20, 1985. I find that the occupational disease provisions of the Act, as amended in 1984, are applicable to hearing loss claims, and that Claimant is entitled to compensation for his hearing loss even though it manifested itself after his retirement from the Bath Iron Works shipyard in 1972. Noise-induced hearing loss has consistently been treated as an occupational disease. (See, e.g., *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.) *cert. denied*, 350 U.S. 913 (1955); *Whitlock v. Lockheed Shipbuilding and Construction Co.*, 12 BRBS 91 (1980); *Tisdale v. Owen-Corning Fiber Glass Co.*, 13 BRBS 167 (1981);

Verderane v. Jacksonville Shipyards, 14 BRBS 220.15 (1982)). Accordingly, I find that this Claimant is entitled to permanent partial disability compensation for his work-related hearing loss commencing on September 6, 1985.

Section 10(d)(2)(B) of the Act, as amended in 1984, provides that in cases of permanent partial disability due to occupational disease where the "time of injury" occurs more than one year after the employee has retired, "the average weekly wage shall be deemed to be the national average weekly wage "as determined by the Secretary pursuant to Section 6(b) applicable at the time of injury". The record indicates, as stated above, that the "time of injury" was September 6, 1985, the date Claimant first received an audiogram and was then made aware of the connection between his hearing loss and his employment. Claimant retired on June 30, 1972. Therefore, Section 10(d)(2)(B) requires that his average weekly wage be considered as $289.83, the national average weekly wage in existence on September 6, 1985.

The application of Section 8(f) is also an issue in this case. The burden of proof is on the employer to show all the facts necessary for 8(f) relief. *Bullock v. Sunshipbuilding & Dry Dock Co.*, 13 BRBS 380, 382 (1981).

Special Fund relief under section 8(f) is available to an employer who hires or retains an employee in its employment when three conditions are met: (1) the Employee has an existing permanent partial disability, which (2) is manifest in the sense of being determinable by a professional diagnostician in the field, and (3) the existing permanent partial disability combines with a

subsequent work-related injury or aggravation to produce a greater degree of permanent partial or even permanent total disability. The requirement that the existing permanent partial disability be manifest to the Employer has been construed not to require actual knowledge on the part of the Employer. Rather, a wide variety of situations will suffice to satisfy the "manifest disability" requirement. *See, e.g., OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452 (3d Cir. 1978).

Notwithstanding the fact that Section 8(f) applicability was not put forth as an issue by the Respondent either in its pre-hearing statement or during the course of the hearing held on February 10, 1988, medical evidence developed via deposition on a post-hearing basis disclosed for the first time that the Claimant was afflicted with a pre-existing impairment in the form of a mixed hearing loss attributed, in part, to occupational noise exposure while another portion of the hearing loss was related to other factors. It is further noted that Respondents reserved the right to raise the Section 8(f) issue on a post-hearing basis in the event that such medical information became available after the hearing indicating that Section 8(f) is applicable. I thus determine that these circumstances warrant my consideration of the Section 8(f) issue at this time. *Mason v. Bender Welding and Machine Co.*, 16 BRBS 307 (1984).

There is evidence which demonstrates that Claimant was suffering from a permanent binaural hearing loss that was made manifest to Respondent on an audiogram performed in the course of regularly conducted shipyard clinic activity by Bath Iron Works in 1954. The December 29, 1954 audiogram administered by the Bath Iron Works

infirmary disclosed that Claimant had a binaural hearing loss of 40.6% at that time. The 1954 audiogram results were converted from the older ASA standard to the revised ANSI specifications, which calculated to a 40.6% binaural hearing loss. Despite its awareness of that hearing loss, Respondent retained Claimant as an employee until his retirement in 1972. The record indicates that, after 1954, Claimant suffered further hearing loss at work which combined and coalesced with his prior permanent hearing loss so as to render his 1985 hearing loss to be of greater magnitude than in 1954. The 1954 audiogram was admitted into evidence thereby allowing for consideration of its probative value by weighing it in conjunction with the totality of the record evidence. I further take into consideration the testimony of Drs. Dixon and Haughwout that established that the December 29, 1954 audiogram taken at Bath Iron Works revealed a permanent hearing loss unrelated, in part, to occupational noise exposure. Thus, Employer was made aware of a preexisting permanent partial disability, part of which was unrelated to a work injury, and retained Claimant in employment for several years until his retirement in 1972. Therefore, I conclude that this audiogram represents the best available evidence of the extent of Claimant's preexisting binaural hearing loss of 40.6% during his employment at Bath Iron Works in 1954, which combined and coalesced with the subsequent hearing loss to result in a total binaural hearing loss of 82.4% attributed, in part, to harmful noise exposure at Respondent's shipyard.

The Director has presented no tangible evidence which would support a position that Section 8(f) relief

should not be made available to the Respondent in this case. Based upon this fact, in conjunction with those facts and circumstances just mentioned above, I find all the requirements for Section 8(f) applicability to have been met, and hence conclude that Employer is entitled to the relief afforded by that Section of the Act.

Inasmuch as the employer is entitled to Section 8(f) relief, the compensation due must be apportioned between the employer and the Special Fund. I find that the total compensable binaural hearing loss is 82.4%. Accordingly, I determine that the compensation due for a binaural hearing loss pursuant to Section 8(c)(13) of the Act attributable to 82.4% of 200 weeks represents a payment of such compensation for a total of 164.8 weeks. I determine that the Employer is liable for compensation attributable to 41.8% of 200 weeks which represents 83.6 weeks while the Special Fund is liable for payment of such compensation for 40.6% of 200 weeks which represents 81.2 weeks.

With regard to medical expenses, it has been held that a claim for payment or reimbursement of such expenses is never time barred. *See Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). However, in order to be entitled to reimbursement of medical expenses, a Claimant must comply with the requirements set forth in Section 7 of the Act. As previously determined, the Claimant was exposed to injurious noise levels while employed at Bath Iron Works and therefore has sustained an injury cognizable under the Act. In connection with Claimant's claim for reimbursement for these expenses, it is noted that counsel for the Claimant, in a letter dated September 23, 1985, requested Bath Iron Works to authorize medical

services. However, at no time did the Claimant introduce evidence that the medical provider had furnished a report within ten days following such treatment as required by Section 7(d)(2) of the Act. Notwithstanding the requirements of Section 7(d)(2), I excuse the failure to furnish the report within the ten day period insofar as I determine it to be in the interest of justice to do so. It is noted that the Employer is not prejudiced by the failure of the medical provider to file its report because the Employer was aware of the injury by reason of the filing of the claim on September 20, 1985 and was apprised by Claimant's attorney on September 23, 1985 that he was seeking authorization for medical treatment. *Rogers Terminal and Shipping Corp. v. Director,* 18 BRBS 79 (CRT 1986). Furthermore, there is no record evidence of the Employer or Carrier having responded to Claimant's request for authorization of a medical evaluation. I approve the reimbursement of those medical expenses Claimant incurred in the amount of $55.00 for the September 24, 1985 evaluation and the November 1, 1985 report from Dr. Haughwout and $74.80 for a hearing aid repair and consultation by the Pine Tree Society. Additionally, it is noted that these expenses were incurred for litigation purposes and are also recoverable under Section 28 of the Act. I thus conclude that the Bath Iron Works and Commercial Union Insurance Company are responsible for reimbursement of Claimant's past medical expenses.

Inasmuch as the Claimant has proved the existence of a work-related injury, he is entitled to reimbursement for reasonable and necessary future medical expenses related thereto cognizable under Section 7 of the Act. *Mattox v.*

Sun Shipbuilding Co., 15 BRBS 162 (1982). Bath Iron Works and Commercial Union Insurance Company are also obligated under the Act to pay for or to reimburse the Claimant for all such future reasonable and necessary medical expenses as are related to the work-related injury which the Claimant sustained on September 6, 1985 subject to the provisions of Section 7 of the Act.

Claimant's attorney may file an attorney fee application in view of the successful prosecution of this case matter. He shall file an application which comports with the requirements of 20 C.F.R. 702.132 and will serve a copy upon the employer and responsible carrier who will have ten days following receipt thereof to file objections thereto.

The Claimant is entitled to interest on any accrued unpaid compensation benefits, such interest to be computed at the rate prescribed by 28 U.S.C. 1961.

Based on the foregoing findings of fact and conclusions of law, I make the following compensation order. The specific dollar computations of the compensation order shall be administratively performed by the Deputy Commissioner.

ORDER

It is therefore ORDERED that:

1) Bath Iron Works and the Commercial Union Insurance Company shall pay to the Claimant compensation for permanent partial disability pursuant to Section 8(c)(13) of the Act for a 41.8% binaural hearing loss, based on a national average weekly wage of $289.83,

commencing on September 6, 1985 for a period of 83.6 weeks.

2) Thereafter, the Special Fund, pursuant to the provisons [sic] of Section 8(f) of the Act, shall pay to the Claimant compensation for permanent partial disability pursuant to Section 8(c)(13) of the Act, for a 40.6% binaural hearing loss, based on a national average weekly wage of $289.83, for a period of 81.2 weeks.

3) Interest shall be computed at the rate specified in 28 U.S.C. 1961 that is in effect when this decision and order is filed in the Office of the Deputy Commissioner on all accrued benefits computed from the date each payment was originally due until paid.

4) Bath Iron Works and Commercial Union Insurance Company shall reimburse the Claimant for the $55.00 expended in connection with the September 24, 1985 examination and the November 1, 1985 report of Dr. Haughwout and $74.80 expended in connection with his hearing aid repair and consultation by the Pine Tree Society for Handicapped Children and Adults pursuant to Section 7 of the Act.

5) Bath Iron Works and Commercial Union Insurance Company shall pay for or reimburse Claimant for the reasonable costs of such medical care and treatment related to the Claimant's work-related injury of September 6, 1985, subject to the provisions of Section 7 of the Act.

/s/ Martin J. Dolan, Jr.
MARTIN J. DOLAN, JR.
Administrative Law Judge

Dated: OCT 03 1988
Boston, Massachusetts
MJD:dr

APPENDIX D

Longshore and Harbor Workers' Compensation Act [33 U.S.C. § 902(10)]

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

Longshore and Harbor Workers' Compensation Act [33 U.S.C. § 908(c)(1 - 13, 21, 23)]

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

* * *

(21) Other cases: In all other cases in the class of disability, the compensation shall be $66^2/_3$ per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

* * *

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be $66^2/_3$ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

Longshore and Harbor Workers' Compensation Act [33 U.S.C. § 910(d)(2)]

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i)) occurs –

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 6(b)) applicable at the time of the injury.

Longshore and Harbor Workers' Compensation Act [33 U.S.C. § 910(i)]

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.